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80-1517

NO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

FRANK JULIUS MAZZUCA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "enterprise" element of the RICO statutes (18 USC § 1961-1968) encompass illegitimate organizations which engage in a pattern of racketeering activity or does that element instead describe legitimate organizations which are the victims of those who engage in a pattern of racketeering activity?

PARTIES TO THE PROCEEDING BELOW

The appeals of the following persons were adjudicated in the decision of the United States Court of Appeals for the Ninth Circuit of which review is sought herein:

1. John Joseph Carbone
2. Joseph M. Carbone
3. Ronald John Williams
4. Frank Julius Mazzuca
5. George V. Janovich
6. Richard Francis Caliguri
7. Lamont Arnold Zemek.

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, filed on October 6, 1980.

I. OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is contained in Appendix A. No opinion was rendered by the District Court for the Western District of Washington. The Judgment and Commitment of the District Court, contained in Appendix B, was filed July 17, 1979.

II. JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed and entered on October 6, 1980. Petitioner timely petitioned for rehearing and that petition was denied on January 7, 1981. The order of denial is submitted as Appendix C.

Jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1)

III. STATUTES INVOLVED

The question presented involves interpretation of 18 USC §§ 1961 and 1962 in general, and 18 USC §§ 1961(4) and 1962(c) and (d) in particular. The text of these statutes is submitted as Appendices D and E.

IV. STATEMENT OF THE CASE

Petitioner Mazzuca was one of fifteen defendants charged in a seventeen count superceding indictment. His trial, along with seven of his codefendants, lasted three months and took place in San Francisco by virtue of a change of venue granted due to extensive publicity.

Mazzuca was charged, along with combinations of others, in four of the seventeen counts as follows:

Count I - violation of 18 USC § 1962(d), the RICO conspiracy statute;

Count IX - violation of 18 USC § 1955 and 2, conducting an illegal pot limit poker business;

Count X - violation of 18 USC § 1955 and 2 conducting an illegal blackjack business; and

Count XI - violation of 18 USC § 1511, conspiracy to obstruct enforcement of state law with intent to facilitate illegal gambling businesses (the poker and blackjack business alleged in counts IX and X). (CR 317)*

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*"CR is a reference to the Clerk's Record, Western District of Washington. "CR,Cal." is a reference to the Clerk's Record, Northern District of California. "RT" is a reference to the Reporter's Transcript, and "Ex" is a reference to exhibits.

All defendants were charged in count I. Defendants other than Mazzuca, in varying combinations, were charged in the balance of the indictment with one substantive RICO offense and various other substantive offenses which comprise crimes upon which RICO culpability is predicated.

Petitioner was found guilty of all four counts upon which he was tried, resulting in a sentence totalling fifteen years imprisonment, $30,000 in fines and substantial costs. (Appendix B)

The count I RICO conspiracy charge dominated the proceedings. It alleged, either directly or through incorporation by reference, all of the other sixteen counts plus a great deal more. Twenty-nine acts of racketeering were alleged. Of those, this petitioner was alleged to have been involved in the following four:

1. Arson of the Players Tavern on 12/18/72;
2. Conducting an illegal pot limit poker business between about 5/23/73 and

7/1/78, as charged in count IX;

3. Conducting an illegal blackjack business on 8/16/78, as charged in count X; and

4. Conspiring to obstruct enforcement of state law with intent to facilitate the pot limit poker and blackjack businesses listed in 2 and 3 above, as charged in count XI.

One hundred-seven overt acts were alleged; of those, petitioner was alleged to have participated in the following six:

1. Players Tavern Arson of 12/13/72;

2. Assault on Red Roof Tavern manager (Bruce Michael) of 11/73;

58. Solicitation to smoke bomb Luigi & Boris' Italian Restaurant on 4/27/78;

68. Directing an undercover agent to a pot limit poker game on 6/14/78;

71. Receiving a tally of preceding night's pot limit game on 6/17/78; and

73. Offering to sell Mr. Lucky's Tavern together with pot limit poker games

on 6/20/78.

Count I was the mold in which the joint trial of multiple defendants for multiple related and unrelated crimes was cast. The catalyst appears in the first two paragraphs of count I wherein it is alleged that: (1) the defendants conspired to participate in the affairs of an enterprise through a pattern of racketeering activity; and (2) the enterprise was

> ... a group of individuals associated in fact, although not legal entity, for the purpose of controlling and attempting to control the tavern business in and around Pierce County, Washington by making and retaining profits... (through criminal acts involving violence and gambling which comprise specified racketeering activity). (CR 317, p.2)

18 USC §§ 1962(c), (d) and 1961(1) and (5) require one who is employed by or associated with an enterprise engaged in interstate commerce to conspire to conduct or participate in the affairs of that enterprise through the commission of at least two specifically listed state or federal crimes, and those specifically listed crimes are collectively labeled

"racketeering activity."

Of the four such acts of racketeering to which the indictment limited petitioner's role, the jury convicted him of the three with which he was charged in subsequent counts: conducting a pot limit poker business (count IX), conducting an illegal blackjack business (count X), and conspiring to obstruct state law enforcement to facilitate conduct of the first two (count XI). Because a general verdict (Appendix H) was received, and because the arson of the Players Tavern was a state crime and thus not charged in a separate count, it is not known whether he was deemed guilty of the fourth racketeering activity. Because of the general verdict, juror confusion and the nature of the pertinent instructions, it is also not possible to know with certainty whether the jury deemed petitioner to have committed any of these acts of racketeering in furtherance of the alleged conspiratorial enterprise's purpose.

The jury expressed confusion regarding the nature and purpose of the "enterprise conspiracy" alleged and was given conflicting instructions thereon. In its initial instructions, the District Court advised the jury that "the alleged group of co-conspirators termed the enterprise... means persons who form an association by virtue of their concerted criminal activities...;" and that the purpose of the enterprise was "to control and attempt to control the tavern business in and around Pierce County, Washington, by making and retaining profits via... (enumerated criminal acts)." (CR,Cal.187, Instruction Nos. 23, paragraph 2, and 26, paragraph 1). The language used by the court was copied from the indictment, a copy of which was given to the jury along with the instructions. (RT 9086, 9132, 9140) Thereafter, during deliberations, the jury wrote the court indicating, inter alia, that it was experiencing controversy over the "essential nature" of the conspiratorial enterprise's unlawful plan. In

the second paragraph of the jury inquiry the foreman wrote:

> * * * Could you define "essential nature" in this case for us, or must we decide this for ourselves - e.g., if the "essential nature" specifically means control of the tavern business in Pierce County, then certain conclusions might or might not be drawn. (Emphasis by the foreman)

That part of the court's response pertinent here was:

> * * * It is up to the jury to determine the essential nature of the plan, bearing in mind the charges in the Indictment, the evidence, and the instructions of the Court.*

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*CR,Cal.187 - there is no docket number assigned the communications to or from the jury or the related docket entries, so they are herein cited by date and time as: Juror Note, 6/15/79 @ 3:00 PM. The note itself was mis-dated by the jury as "17 Feb. 1979." The court's responsive note is dated 6/16/79 @ 10:15 AM. Both items are attached at Appendices F and G respectively. The general verdict is attached at Appendix H.

Thus as a matter of law the court initially instructed, as the government had alleged, that the three principal elements of the 18 USC § 1962(d) offense denominated "enterprise", "conspiracy" and "pattern of racketeering activity" were identical - that the essential nature of the conspiracy was that it was an enterprise which was a group of people who were associated by virtue of any crimes they had committed for the purpose of controlling the tavern business by making and retaining profits. It further followed in the court's instructions that all criminal activity alleged was enterprise activity as a matter of law if the jury should find the mere fact of its commission. After the jury expressed difficulty in applying this formula, the court literally reversed its field and told the jury that it was up to it to determine what the essential nature and purpose of the enterprise was as a question of fact.

The Circuit Court's opinion did not deal with the problems raised by petitioner over

the jury inquiry and response. Brief of Appellant Mazzuca, pp.57, A-42-43; and Reply Brief of Appellant Mazzuca pp.14-15, 18-21.

From the jury note it plainly appears that the juror controversy arose over the variance problem inherent in the formula that all racketeering activity alleged defines the scope of the enterprise and thus the conspiracy. To provide a contextual perspective, some background peripheral to the primarily procedural history required by the question presented seems necessary at this point. One of the biggest and most time consuming aspects of the trial involved a legal and factual contest over whether the vicious extortion of a man named Weinstein by co-defendant John Carbone had anything at all to do with the alleged enterprise conspiracy to control the tavern business. The record reflects that the only direct evidence of the purpose of this extortion was to exact money and suffering because of a longstanding unrelated personal grudge borne by John Carbone and his

wholly inaccurate suspicion that the victim had given personal income tax information to authorities. The government's position, adopted by the Circuit Court on pp. 13a-15a, Appendix A, was that it was fair to infer that an IRS investigation of Carbone could lead to the uncovering of hidden tavern interests. The defense maintained that the record was devoid of any basis upon which to support such a link and that the government had directly and patently proved the crime to be unrelated to the tavern control enterprise. The significance of the Weinstein matters to jury deliberations is apparent because they occur in seven of the seventeen counts alleged, comprise six of the acts of racketeering and command twenty-nine of the overt acts alleged in count I. Another equally obvious variance dispute which directly involved petitioner, but which the Circuit Court did not address, arose over an assault on one Bruce Michael, manager of the Red Roof Tavern, who testified to the wholly unrelated nature of the crime.

In significant contrast, many of the other crimes proved which went to the jury were clearly related to controlling and profiting from taverns. It was in this context that the jury groped to apply the court's instructions defining the nature and purpose of the enterprise alleged. The opinion, however, gives the jury inquiry and instruction subject new significance because the Ninth Circuit made the factual finding at page 10a that the record would justify petitioner's conviction for RICO conspiracy whether or not the 18 USC § 1961(4) element of "enterprise" was mis-alleged, mis-defined and mis-tried.

Before the Ninth Circuit Court of Appeals this petitioner raised the question here presented in a format which emphasised the Weinstein matters out of hope that its presentation in a context which differed from that used by his co-appellants might aid in dramatizing unjustifiable prejudicial irrelevance and variance. The issue was discussed in the Brief of Appellant Mazzuca at pp.39-57 and

in the Reply Brief of Appellant Mazzuca at pp.12-21 in a context which attempted to illustrate that the admission of evidence such as that against this appellant was and is so foreign to all non-RICO conspiracy law that it is unmanagable as well as patent error to define "enterprise" as any group associated for what boils down to the general purpose of committing crime regardless of any more specific and limiting allegations of its nature and purpose and regardless of the obvious language of the statute. The District Court had not based its evidentiary rulings on the factual conclusion that the Ninth Circuit did by inferring a speculative link between a non-existant IRS informer and enterprise fear of discovery. The District Court ruling was predicated on the Fifth Circuit idea that the statutory element of enterprise could not be applied unless it was defined as a novel super conspiracy which displaces law otherwise applicable to conspiracies. See trial court

comment at RT 6639 and U.S. v. Elliott, 571 F.2d 880 (5th Cir.1978), cert. den., 439 U.S. 953, 99 S.Ct. 349 (1978).

In the Ninth Circuit Court of Appeals the government's successful response to the "enterprise" definition problem was that the Circuit Court in U.S. v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. den., 445 U.S. 946, 100 S.Ct. 1345 (1980), had, after the trial herein, committed itself to the Elliott, supra, position that the term "enterprise" encompassed any illegal combination the purpose of which was to profit from crime in general, thereby eliminating any questions of variance, relevance or integrity of the indictment and jury instructions. The government, as noted, was likewise successful with its alternative response that the facts showed the alleged enterprise conspiracy not to be wholly illegitimate and; therefore, that adoption of the construction for which the defense contended would make no difference. That factual issue was

neither alleged nor tried to the jury. The definition urged by the defense was not merely a matter of whether wholly illegitimate enterprises are excluded from RICO culpability, but whether an "enterprise" was intended by Congress to be that distinct element of a RICO offense which describes the requisite victim as opposed to the racketeers who prey upon that victim.

Petitioner submits that this Statement of the Case is fairly summarized by reciting the procedural fact that he was tried and convicted on an indictment which failed to allege a crime.

V. REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURTS OF APPEALS ARE IN CONFLICT OVER WHETHER THE 18 USC § 1961(4) TERM "ENTERPRISE" DESCRIBES ILLEGITIMATE AS WELL AS LEGITIMATE BUSINESSES.

Petitioner believes that this Court consented to resolve the conflict presented when it granted certiorari to the First Circuit Court of Appeals in U.S. v. Turkette, No.80-808, on January 26, 1981. While petitioner's counsel has not seen the petition therein granted, his

reading of the First Circuit opinion, F.2d (Nos. 79-1545 and 1546 decided 9/23/80), leads to this belief because that court held an indictment like that upon which Mr. Mazzuca was tried to be invalid based upon the conclusion that:

> We think that the courts' natural antipathy to organized crime has clouded their perception of RICO, its purpose, and legislative history. What seems to be overlooked is that persons who participate in an illegitimate enterprise will not escape punishment for their criminal activities if they are properly indicted and tried for these acts. Each act of racketeering delineated in section 1961(1), as well as conspiracy to commit such crimes, are already criminal acts under federal or state statutes, or both. We need not distort a statute in order to property prosecute criminals. RICO was not enacted as an offensive weapong against criminals but as a shield to thwart their depredations against legitimate business enterprises.

(Page 19 of the slip opinion)

That opinion contains a more effective statement of why certiorari should be granted in Petitioner Mazzuca's case than he might hope to offer here. The only ingredient missing from the First Circuit's history of this substantial conflict is the opinion in U.S. v. Anderson, 626 F.2d 1358 (8th Cir.1980), cert.

den., No. 80-766 (2/23/81), which brings the Eighth Circuit in line with the First and Sixth Circuits. U.S. v. Sutton, 605 F.2d 260 (6th Cir.1979) (Engle, J. dissenting) (opinion withdrawn for rehearing en banc, 1980).

Only the Tenth Circuit has yet to discuss the issue presented.

As in Petitioner Mazzuca's case, U.S. v. Carbone, et al, No. 79-1550 (9th Cir. 10/6/80), a panel decision following the panel decision in U.S. v. Rone, 598 F.2d 564 (9th Cir.1979) (Ely, J. dissenting), cert. den., 445 U.S. 946, 100 S.Ct. 1345 (1980), the Second and Seventh Circuits have, by single panel decisions accompanied by vigorous dissents, adopted the position that the RICO term "enterprise" describes wholly illegitimate criminal operations as well as, and sometimes rather than, the business entities they victimize; U.S. v. Altese, 542 F.2d 104 (2nd Cir.1976) (Van Graafiland, J. dissenting), cert. den., 429 U.S. 1039 (1977), implicitly overruling U.S. v. Moeller, 402 F.Supp.49, 58-61 (D. Conn. 1975); U.S. v. Aleman, 609 F.2d 298 (7th Cir.1979) (Swygert,

J. dissenting), cert. den., 445 U.S. 946, 100 S.Ct. 1345 (1980). The Third, Fourth and Fifth Circuits, again by panel decisions only, have unanimously adopted this position. U.S. v. Provenzano, 620 F.2d 985 (3rd Cir.1980); U.S. v. Whitehead, 618 F.2d 525, opinion rendered in footnote 1 at 525 (4th Cir.1980); U.S. v. Elliott, 571 F.2d 880 (5th Cir.1978), cert. den., 439 U.S. 953, 99 S.Ct. 349 (1978).

In the opinion below in Mr. Mazzuca's case, the Ninth Circuit said, at footnote 10 of the slip opinion, that the District of Columbia Circuit had also adopted the view that both legitimate and wholly illegitimate businesses fall within the concept of "enterprise". However, that case dealt with the perversion of a legitimate restaurant business by narcotics dealers who used it as an illegal drug store as well, and the defendant in that case was employed by or associated with the otherwise legitimate restaurant enterprise. While that court did offer brief favorable comment on the view that "enterprise" could include any group,

legal or illegal, which might be alleged, the case did not present the issue. Though the opinion does not recite the pertinent nature of the indictment, it appears that the "enterprise" alleged was the restaurant. If so, that case is not at odds with those who hold the view that "enterprise" was intended to describe the criminals' victim which Congress sought to protect rather than the criminals themselves.

Petitioner respectfully suggests that the issue he presents is particularly ripe for review at this time as demonstrated by the conflict apparent among, and in several cases within, the Circuits. If the grant of certiorari in U.S. v. Turkette, No. 80-808 is for the purpose of resolving this conflict, petitioner further suggests that he presents a record which offers some additional academic implications of benefit to a thorough resolution of the dispute. It offers more than merely a defense as well as a prosecution petition.

The case objectively demonstrates jury confusion arising from an awkward application of the complex statute. The jurors received instructions which, upon analysis, described the essential nature of the "enterprise" by the same criteria used not only to define the "pattern of racketeering activity" but the conspiracy itself. See U.S. v. Anderson, 626 F.2d 1358, first full paragraph of second column at 1360 (8th Cir.1980), cert. den., No. 80-766 (2/23/81). This not only left the jury with no identifiable basis to distinguish between the substantive offense prohibited by 18 USC § 1962(c) and the conspiratorial offense prohibited by § 1962(d), Ibid., but left it with no identifiable basis upon which to determine or justify a factual conclusion that more than one separate conspiracy, or more than one enterprise for that matter, were proved. See Turkette, supra, at p.27 of the slip opinion. Only these reasons appear available to explain the jury's motivation for the request that the court redefine the

essential nature and purpose of the enterprise. The Court provided no further help but to tell the jurors that it would be left to them, demonstrating, petitioner suggest, the unworkability of the government's position.

This case also provides a rather dramatic circumstance by which to examine appropriate appellate disposition in the event that the Turkette position is adopted by this Court. In an apparent attempt to foreclose re-examination of petitioner's case, the Ninth Circuit, at pp.10a-12a of Appendix A, found that even if Mr. Mazzuca's position was adopted ample evidence existed to negate his premise that the enterprise in question was wholly illegitimate. The panel thus implied that his conviction should be affirmed in either event. Petitioner suggests that such a view begs the question because the factual recitation by which the court justifies its view describes at least one if not several "enterprises" which bear no resemblance to the conspiracy enterprise alleged in the indictment upon which

petitioner was tried. Petitioner had neither the notice nor the opportunity to litigate the many factual issues raised and decided by the appellate court which include, for example: single as opposed to multiple victimized "enterprises"; single or multiple conspiracies in a significantly different context; which, if any, of the gambling, tavern, restaurant, bail bond, and auto sales businesses with which various and changing combinations of defendants were associated at various times were or were not ostensibly legal, as opposed to wholly illegal; and, inter alia, whether either Mr. Weinstein and his mortgage company or the Red Roof Tavern manager suffered properly joined and relevant crimes. To deny petitioner his notice and trial on these issues is to deny him his right to a jury and his right to Due Process.

> Criminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issue put to it been framed differently.

U.S. v. Carman, 577 F.2d 556, 568 (9th Cir. 1978). Such error cannot be held harmless

beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

If this Court should adopt the Turkette construction of the RICO statutes which petitioner urges, it is suggested that it will thereby render count I of the indictment invalid and subject to dismissal. Otherwise petitioner will stand convicted of a non-existant crime.

VI. CONCLUSION

A writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

DATED this 14th day of March, 1981.

Respectfully submitted,

LANNING & BRYAN

By

ROBERT S. BRYAN
Attorney for Petitioner

APPENDICES

Appendix A
Opinion of United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-1549
No. 79-1567
No. 79-1550
No. 79-1551
No. 79-1552
No. 79-1537
No. 79-1536

DC# CR-78-97T (Seattle)
DC# CR-79-68M (S. F.)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN JOSEPH CARBONE, RONALD JOHN WILLIAMS, FRANK JULIUS MAZZUCA, GEORGE V. JANOVICH, JOSEPH M. CARBONE, RICHARD FRANCIS CALIGURI and LAMONT ARNOLD ZEMEK,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Washington
Morell E. Sharp, District Judge, Presiding
[Argued and Submitted August 11, 1980]

Before: WRIGHT and SNEED, Circuit Judges, and ENRIGHT, District Judge.*

WRIGHT, Circuit Judge.

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*Of the District of Southern California

Appendix A
Opinion of United States Court of Appeals

Appellants attack the sufficiency of the evidence to support their convictions for a racketeering conspiracy and numerous substantive offenses connected therewith. They also assign error to designated instructions and evidentiary rulings. We affirm.

Count 1 of the seventeen count indictment charged fifteen confederates with conspiring over a seven-year period (1971 to 1978) to conduct the affairs of an "enterprise," the tavern business of Pierce County, Washington, through a pattern of racketeering. 18 U.S.C. § 1962(d).

The alleged racketeering activities included acts and threats of murder, arson and bribery (in violation of state law) and gambling, mail fraud, extortion and obstructing communication to criminal investigators (in violation of federal law). The remaining counts charged several defendants with these substantive federal crimes.

The seven appellants include the owners and operators of several taverns in Pierce County (John Carbone and his son, Joseph; Williams; and Mazzuca); an alleged "strong-arm" (Caliguri); a "middleman" (Zemek); and the "protector" (former Pierce County Sheriff Janovich). The indictment characterized John Carbone as the "leader" of the organization with Ron Williams as his "chief lieutenant."

Because appellants challenge the sufficiency of the evidence as to several counts, the evidence adduced at trial as to each count will be discussed separately. We view the evidence, as we must, in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Basey*, 613 F.2d 198, 201 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1854 (1980).

Appendix A
Opinion of United States Court of Appeals

FACTS

The mass arrests of defendants in November 1978 marked the culmination of a federal undercover operation begun in the fall of 1977. The investigation was prompted by a rash of arsons at Pierce County taverns and topless dancing establishments. Between 1972 and 1977 three taverns in which Williams, Mazucca, John Carbone, and Joe Carbone had ownership or management interests were destroyed by fire.[1] All were insured. There was evidence that, prior to the fires, the establishments had been experiencing poor business. Thereafter, mortgages and debts were paid, the premises were remodeled or new establishments were opened nearby.

Between 1976 and 1978 seven suspected arsons also occurred at the establishments of competitors in the tavern, disco ord topless dancing business.[2] Because local law enforcement officers were unsuccessful in apprehending the prepetrators, the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) began a joint investigation of the tavern fires with the sheriff's office in the fall of 1977.

By April 1978, evidence indicated Sheriff Janovich was providing information to a principal target (Williams). The ATF feigned abandonment of the investigation and dissolved the "partnership." Thereafter, the FBI and ATF conducted an undercover operation.

After his arrest in April 1978, defendant Michael Valentine agreed to cooperate with the ATF. Thereafter, the government recorded conversations between

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[1]The Players (1972); The Exit (1976); Black Knight (1977).

[2]The Family Amusement Center was damaged by fire in March 1977. The Top of the Ocean disco and restaurant was destroyed by fire in April 1977. The Black Forty tavern suffered three arsons in 1977. The Night Moves tavern was firebombed in November 1977 and destroyed by fire in February 1978.

Williams and Valentine in which Williams admitted responsibility for arranging the attempted assassination of a state liquor control board supervisor responsible for policing Pierce County taverns for alcohol and topless dancing violations. In November 1977, the supervisor had been shot four times and seriously wounded.

At trial Valentine testified that he hired defendants Bentley and Johnson to execute the murder contract solicited by Williams. The government introduced evidence for the motive. Three taverns in which Williams and the Carbones had management or ownership interests received notices of topless dancing violations, entailing temporary closures in the months preceding the murder attempt. Williams, John Carbone, and Joe Carbone frequently expressed vitriolic dissatisfaction with the inspector's stringent enforcement activities.

Valentine was also instrumental in introducing undercover agents as Chicago "mobsters" whereby they were able to penetrate gambling activities at Mr. Lucky's and Stan & Ollies, taverns and cardrooms owned and managed by Williams and Mazzuca. Gambling included blackjack and pot limit poker games illegal under state law.[3]

Posing as a potential buyer of Mr. Lucky's tavern and the related gambling activities, an agent was informed that a price could be negotiated to include the law enforcement protection arrangement with the

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[3]Under Washington law wagers are restricted to a $5.00 maximum. *Wash. Rev. Code* § 9.46.020(20)(f); *Wash. Admin. Code* 230-40-120. Pot limit poker games run for the profit of the house are felonious under state law. *Wash. Rev. Code* §§ 9.46.220(20)(c)-(d); -.020(17).

Under Washington law blackjack games are illegal unless played in connection with charitable events and with a special license. *Wash. Rev. Code* § 9.46.030(7).

sheriff's office. Mazucca and Williams participated actively in these negotiations. Williams arranged an initial meeting between the "buyer" and Sheriff Janovich.

In 1976 the Internal Revenue Service (IRS) had initiated a criminal investigation of John Carbone and his activities. Carbone accused Jerome Weinstein, a former business associate, of informing to the IRS. Shortly thereafter, Weinstein's home suffered a series of firebombings and arsons. He was assaulted and seriously injured.

Concurrent with this undercover operation, agents consensually recorded conversations in an attempted extortion scheme involving John Carbone and Williams. John Carbone met with Weinstein soliciting $10,000 to be paid to Williams for protection against harassment. Weinstein agreed to cooperate with the FBI and record conversations with Carbone.

In the fall of 1978 the FBI was also able to infiltrate a nascent plot to bomb a competitor's tavern. In the process of concluding the "sale" of Mr. Lucky's tavern to an undercover agent, Williams sought the "buyer's" help in locating a bomber to blow up the Night Moves tavern, a topless dancing establishment owned by Ron Chase.

The government introduced evidence that Night Moves provided the primary competition for Joseph Carbone's Flitter In. Night Moves had previously been the object of two arsons. In addition, in August 1978 Chase's home had been entered by an armed man subsequently identified as Caliguri who threatened the occupants with bodily injury unless Chase ceased operations.

The FBI arranged for an undercover agent to pose as the bomber. Williams set up the initial telephone

contact, giving the number for Vista Auto Sales. John Carbone, Joe Carbone and Williams were observed listening for varying periods to this phone conversation. Caliguri met several times with the bomber to discuss details.

On November 28, 1978, at the time the final telephone contact was expected at Vista Autos, agents arrested John and Joe Carbone and Williams on the premises. The remaining defendants were apprehended the same day.

Six of the fifteen defendants pleaded guilty and testified at trial. Taped conversations between and among Valentine, Weinstein and undercover agents, on the one hand, and John Carbone, Williams, Mazzuca, Zemek, Caliguri and Janovich, on the other, formed an important part of the government's case.[4]

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[4]The district court expressly found the tapes and transcripts to be accurate and authentic and this finding is not challenged on appeal. *See United States v. King*, 587 F.2d 956, 961 (9th Cir. 1978).

Janovich does assert that tapes of conversations between an undercover agent, and himself and Williams, should be excluded as obtained contrary to state law. *Wash. Rev. Code*, Ch. 9.73.030 (prohibiting recordings absent consent of *all* parties or court order). The conversations were recorded pursuant to 18 U.S.C. § 2511(c) which permits recording if *one* party gives prior consent or acts under "color of law."

To be admissible, the recordings need only satisfy federal law and constitutional requirements. *United States v. Keen*, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975). If one party consents, there is no federal constitutional violation. *Id.* Thus, even though state statutes may require the consent of both parties, admissibility in federal court is determined by federal law. *United States v. Testa*, 548 F.2d 847, 855 (9th Cir. 1977).

Janovich's attempt to distinguish his case from *Keen* is not persuasive. He argues state law applies because he was "charged" with "underlying state crimes." Although state offenses are incorporated into federal racketeering and gambling statutes, violation of state law is not the sole element of the charged federal offenses.

(footnote continued on following page)

After a three month trial,[5] the jury acquitted defendant Levage of all charges and returned guilty verdicts against the seven remaining defendants as to all counts in which they were named. The trial court imposed generally concurrent sentences and cumulative fines.[6]

The statutes serve independent federal purposes and are not merely an attempt to enforce state law. *See United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977); *In re Bianchi*, 542 F.2d 98, 101 (1st Cir. 1976); *United States v. Sacco*, 491 F.2d 995, 1003 (9th Cir. 1974) (en banc).

The indictment charged Janovich with federal offenses. The recordings satisfied the requirements of the constitutional and federal law.

[5]The indictment was returned on December 8, 1978 in the Western District of Washington. On January 26, 1979, and February 9, 1979, the trial court granted motions for change of venue and the case was ultimately transferred to the Northern District of California, the Honorable Morell E. Sharp of the Western District of Washington, sitting by designation. Trial by jury began on March 19, 1979, and concluded with verdicts on June 19, 1979.

[6]John Carbone and Williams received multiple concurrent sentences and cumulative fines for all counts. Carbone was charged and convicted on 14 counts. Williams was charged and convicted on 13 counts. Both were sentenced to two 22-year terms for counts 1 and 2 (alleging violations of 18 U.S.C. § 1962(c) and (d)) to be served concurrently. Both were sentenced to five years on each of the remaining counts to be served concurrently with each other but consecutively to the count 1 sentence. Thus, both effectively received 25 year sentences. The total amount of the fines imposed against John Carbone was $163,000; the total for Williams was $172,000.

Mazzuca received a 15-year sentence for count 1. He was charged and convicted on three other counts for which he received three five-year sentences to be served concurrently with each other and count 1. The court imposed fines totalling $25,000.

Joseph Carbone was sentenced to 18 years on count 1. The sentences on the four remaining counts for which he was convicted are to be served concurrently with count 1. The aggregate fine for all counts was $38,000.

(footnote continued on following page)

RACKETEERING CONSPIRACY: COUNT I

Title IX of the Organized Crime Control Act of 1970 added Chapter 96 entitled, "Racketeer Influenced and Corrupt Organizations" (RICO) to Title 18 of the United States Code. RICO prohibits investment in, control, or operation of an "enterprise" through a pattern of racketeering activity. *See* 18 U.S.C. §§ 1961-1968. RICO defines "enterprise" somewhat ambiguously to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The definition of "racketeering activity" incorporates eight state crimes and twenty-four specified federal crimes. 18 U.S.C. § 1961(1).[7]

The court imposed no fines against Janovich, Caliguri or Zemek and ordered their sentences be served concurrently. Thus, Janovich and Zemek were sentenced to effective terms of 12 years; Caliguri received a maximum 18-year sentence for the five counts for which he was convicted.

[7]18 U.S.C. § 1961(1) provides:

"Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or

(footnote continued on following page)

Finally, RICO requires a "pattern" of racketeering activity: at least two acts of racketeering committed within a period of ten years. 18 U.S.C. § 1961(5). The alleged pattern herein consisted of 29 predicate offenses involving, *inter alia*, multiple acts of arson, extortion and gambling.

Section 1962, the substantive portion of RICO, employs the foregoing definitions to create three offenses. *See* 18 U.S.C. § 1962(a)-(c). Pertinent to this appeal is subsection 1962(c) which prohibits any person employed by or associated with an enterprise from conducting its affairs through racketeering activity.[8] Count I charged each appellant with a conspiracy to violate this subsection under 18 U.S.C. § 1962(d). The indictment alleged 107 overt acts in furtherance of this conspiracy.

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extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

[8] 18 U.S.C. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Appellants raise three objections related to count one: (1) permitting application of RICO to defendants' activities; (2) failing to charge multiple conspiracies; and (3) insufficiency of the evidence.

1. RICO ENTERPRISE

Appellants assert that their activities did not fall within the scope of the term "enterprise," a statutory element of the RICO offense. They argue that their alleged operations were wholly illegitimate, and therefore outside the purview of RICO which evinces Congressional concern with criminal infiltration of legitimate businesses.

This argument is unavailing in light of Ninth Circuit precedent to the contrary. Furthermore, ample evidence exists to negate appellants' premise that the enterprise in question was wholly illegitimate.

This circuit has rejected the argument that wholly illegitimate enterprises are outside the scope of RICO and has held that an association formed for illicit purposes will satisfy the enterprise requirement. *United States v. Rone*, 598 F.2d 564, 568 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980). Although criticized,[9]

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[9]*See, e.g., United States v. Aleman*, 609 F.2d 298, 311 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980) (Swygert, J., dissenting); *United States v. Rone*, 598 F.2d 564, 573-74 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980) (Ely, J., dissenting); *United States v. Grzywacz*, 603 F.2d 682, 690-91 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 2152 (1980) (Swygert, J., dissenting); *United States v. Altese*, 542 F.2d 104, 107-110 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (Van Graafeiland, J., dissenting). Bradley, Racketeers, Congress & the Courts: An Analysis of RICO, 65 Iowa L. Rev. 837, 892-93 (1980); Note, 65 Va. L. Rev. 109 (1979); Note, 27 De Paul L. Rev. 89, 105, 112 (1977).

this is the prevailing statutory interpretation.[10]

A few courts, notably the Sixth and Eighth Circuits, have refused to adopt the expansive definition. *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), submitted for rehearing en banc, April 2, 1980; *United States v. Anderson*, ____ F.2d ____ (8th Cir., Nos. 79-1809, 79-1827, August 7, 1980) (RICO requires discrete economic association separate from pattern of racketeering). *Cf. United States v. Mandel*, 415 F.Supp. 997, 1020 (D. Md. 1976) (pretrial order, not alleged as error on appeal).

Although *Rone* was decided prior to *Sutton*, other circuit courts addressing the issue thereafter have not followed the Sixth Circuit. *See, e.g., United States V. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980). *See also, United States v. Provenzano*, 620 F.2d 985, 992-93 (3d Cir. 1980). *But see, United States v. Anderson, supra.*

Even if the broader definition of "enterprise" adopted in *Rone* did not bind this panel, the charged enterprise satisfies the narrower definition of a group "organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized." *United States v. Sutton*, 605 F.2d at 264. The concern of the *Sutton* majority and of commentators is that the enterprise concept not be extended to include a loosely confederated group of criminals who perform unrelated criminal acts. *See* Note, *Elliott v. United States*: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO, 65 U. Va. L. Rev. 109, 119, n. 68 (1978). This is not such a case.

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[10]*See, e.g., United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980). *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

Certain appellants owned or operated more than six taverns in Pierce County during the relevant period. Organized and acting for ostensibly lawful purposes, they undertook to discourage competition and law enforcement investigation through arson, extortion, and physical violence. Further, they used a legitimate business as an alleged "front" for illegal gambling. This is precisely the type of operation Congress intended to encompass within the enterprise concept. *See United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (restaurant used as a front for narcotics operations).

2. MULTIPLE CONSPIRACIES

Appellants assert that while count 1 alleged but a single conspiracy, the evidence adduced at trial established two separate conspiracies resulting in a variance affecting their substantial rights. *See Kotteakos v. United States*, 328 U.S. 750 (1946); *Berger v. United States*, 295 U.S. 78, 82 (1935).

John Carbone contends: (1) the incidents involving Jerome Weinstein (overt acts 4-5, 10-11, 15, 28, 51-55, 59-61, 65-67, 75, 79, 82, 87-93, 99) constitute a conspiracy independent of the tavern-related crimes; (2) the evidence adduced at trial as to Carbone's participation related only to the "Weinstein matter"; and (3) it was prejudicial error to try him for a single conspiracy.

The recurrent issue of multiple conspiracies involves questions of severance, variance, and misjoinder which restate the basic contention that the evidence proved several separate conspiracies. *United States v. Jabara*, 618 F.2d 1319, 1327 (9th Cir.), *cert. denied*, 100 S.Ct. 2973 (1980). The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. *See United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977). Performance of separate crimes or separate acts in furtherance of

a conspiracy is not inconsistent with a "single overall agreement." *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979). The general test also comprehends the existence of subgroups or subagreements.

Appellants assert there was no connection between the harassment and extortion of Weinstein and the "larger" conspiracy to control the tavern business in Pierce County. It was the government's theory that Weinstein was an enterprise target because he was believed to have been an IRS informant.

As Weinstein's former business associate, John Carbone was in the best position to know what incriminating evidence Weinstein possessed as to Carbone operations. IRS scrutiny could expose the extent of Carbone's financial interests in various enterprise operations and jeopardize enterprise profits. As the alleged "head" of the enterprise, John Carbone might indeed fear a federal tax investigation.

Several circuits have applied a "factors" analysis to distinguish single from multiple conspiracies. *See, e.g., United States v. Cambindo-Valencia*, 609 F.2d 603, 623-25 (2d Cir. 1979), *cert. denied*, 100 S.Ct. 2163 (1980); *United States v. Becker*, 569 F.2d 951, 960 (5th Cir.), *cert. denied*, 439 U.S. 865 (1978). Relevant factors include the nature of the scheme; the identity of the participants; the quality, frequency and duration of each conspirator's transactions; and the commonality of time and goals. A single conspiracy can be identified here either by isolating various elements under the "factors" analysis or by aggregating evidence under the "single agreement" test.

The nature of the instant scheme was to operate and control enterprise taverns and related activities with minimal interference from law enforcement agencies. This entailed numerous actions to protect

illegal activities (e.g., unauthorized topless dancing and gambling) from law enforcement scrutiny. It engendered a pervasive concern regarding investigation by the state liquor board, the ATF, and the IRS.

The potential threat posed by local law enforcement officials was minimal because the sheriff had been successfully bribed. As Williams related to an undercover agent, the only investigators to fear were the IRS or the "feds."

Throughout this period, John Carbone insisted that Weinstein had provided or would provide the IRS with information. He indicated to Weinstein his belief that law enforcement efforts could not succeed without a "stoolie." The harassment activities against Weinstein confirm that he acted upon this belief.

Continuation of enterprise activities was dependent upon concealment. The operations were particularly vulnerable to federal investigation. The so-called "Weinstein matter" was not merely a separate, personal vendetta by John Carbone.

The use of violence to stifle law enforcement efforts was a common denominator. When the state liquor inspector became persistent, a murder attempt was orchestrated. Similarly, a brutal assault was arranged because Weinstein was a perceived threat.

Threats, arson, and extortion were employed against Weinstein, as well as enterprise competitor, Ron Chase. It is undeniable that the Weinstein matter and the tavern conspiracy had overlapping participants. Williams solicited Valentine's services for arson and assault contract procurement in both. Zemek, Levage, and Wilcox were also common participants in arson activities. The evidence revealed a continuing relationship among participants organized in a hierarchical pattern.

The alleged separate conspiracies were also united in time and place. Count 1 charged a conspiracy from 1971 to November 1978. The attacks upon Weinstein occurred from 1976 to November 1978, within the time span of the conspiracy and during the time when other crimes were occurring (for example, the plot to blow up the competing Night Moves tavern). The Weinstein harassment activities promoted the overall goal of the conspiracy by discouraging cooperation with law enforcement officials and providing an object lesson to minions within the enterprise.

The activities were consistent with one overall agreement to control and manipulate taverns and related illegal activities in Pierce County. The unity of time and place, the common identity of participants, the similarity of method and purpose combine to provide a rim sufficient to connect the various spokes of a single conspiratorial wheel.

Having reviewed the record with care, we conclude that there was no variance between the allegations of the indictment and the evidence presented. Thus, the refusal of the trial court to instruct on multiple conspiracies caused no prejudice and is not reversible error. *United States v. Perry*, 550 F.2d 524, 533 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977). The court's instructions were sufficient. *See United States v. Kearney*, 560 F.2d at 1363.[11]

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[11] *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979) does not dictate a contrary result. Therein the court reversed a conviction based on juror bias. In dictum, the court considered the issue of multiple conspiracies because it was likely to arise on remand. The court expressly relied on *United States v. Perry*, 550 F.2d 524 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977), in which the court stated at 533:

> When the possibility of a variance appears between the indictment and the trial proof, the trial court should instruct the jury on multiple conspiracies . . . . However, because of our finding, *supra*, that there is no such variance in the instant case, the failure of the trial court to instruct on multiple conspiracies caused no harm or prejudice to the defendants and, as such, is not reversible error.

As an alternative or supplemental argument in support of its single conspiracy theory, the government asserts that even if a single conspiracy cannot be identified under traditional analysis, the enterprise concept in RICO supplants conventional conspiracy doctrine and defeats appellants' multiple conspiracy objections. Because a single conspiracy can be identified using traditional conspiracy analysis, we need not determine if RICO permits a joint trial of otherwise non-joinable conspiracies.[12]

3. RICO CONSPIRACY

a. ADMISSION OF CO-CONSPIRATORS' STATEMENTS

Before examining the sufficiency of the evidence, we meet appellants' objections to the receipt in evidence of co-conspirators' statements. Statements by one co-conspirator during the course and in furtherance of a conspiracy are admissible as vicarious admissions against another co-conspirator. *See United States v. Sandoval-Villalvazo*, 620 F.2d 744 (9th Cir., 1980). Admission of a co-conspirator's statement is predicated

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[12]In *Elliott v. United States*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), the Fifth Circuit construed the enterprise concept in RICO as circumventing limitations imposed by conventional conspiracy doctrine. 571 F.2d at 900. The court described RICO as supplanting the common objective rationale of conspiracy law with the enterprise concept whereby criminal association itself could constitute an enterprise.

It has been noted that the language and legislative history of RICO do not expressly indicate an intent to rework basic conspiracy law as related to organized crime. *See* Note, 65 U. Va. L. Rev. 109 (1979). *See also United States v. Anderson*, ____ F.2d ____ (8th Cir., Nos. 79-1809, 79-1827, August 7, 1980). In any event, the conspiratorial objective herein is not as ill-defined as in *Elliott*. A single overall agreement can be identified under conventional conspiracy doctrine.

upon independent proof of defendant's participation, however. *See* Fed.R.Evid. 801(d)(2)(E).

Two objections are raised here. First, Janovich argues that a *pretrial* determination of admissibility is required. Second, John Carbone asserts there was insufficient prima facie proof of his involvement, independent of the co-conspirators' statements.

The district court provisionally admitted the co-conspirators' statements subject to establishing the requisite independent proof. Thereafter, it expressly found that a prima facie case of involvement had been established as to the appellants. Janovich argues that a pretrial determination of admissibility is required.

This court has held repeatedly that the order of proof is within the sound discretion of the trial court. *United States v. Sandoval-Villalvazo, supra.* The procedure of conditionally admitting co-conspirator's statements subject to later motions to strike is well within the court's discretion. *United States v. Batimana*, 623 F.2d 1366, 1369 (9th Cir. 1980). Finding no abuse of discretion, we uphold the court's provisional admission of the statements.[13]

The test for admission of co-conspirators' statements is whether there is "sufficient, substantial evidence" apart from them to establish a prima facie case of conspiracy and defendant's slight connection therewith. *United States v. Weiner*, 578 F.2d 757, 768-69 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

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[13]Janovich urges this court to follow the Fifth Circuit citing *United States v. James*, 576 F.2d 1121 (5th Cir. 1978), modified en banc, 590 F.2d 575, *cert. denied*, 442 U.S. 917 (1979). In its en banc opinion, the Fifth Circuit expressed a "preference" for pretrial determination of admissibility, if "reasonably practicable." 590 F.2d at 587. In light of consistent Ninth Circuit precedent allowing conditional admission, we reject Janovich's argument for a mandatory pretrial determination. We note that even under the Fifth Circuit's asserted preference, the practicality of a pretrial determination is questionable here.

Although John Carbone does not challenge the existence of a conspiracy, he does assert there was insufficient independent evidence linking him to the conspiracy.

Carbone's own taped conversations with Weinstein provide the primary evidence linking him to specific activities of the conspiracy. Therein, Carbone admitted his experience in providing "protection" and using muscle; his "control" of Williams; his familiarity with gambling operations; and his transactions with persons he described as "Mafia." His recorded conversations indicated he had observed the assault upon Weinstein.[14] He offered no explanation by evidence of argument for these admissions.

Carbone's reliance upon *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980) is misplaced. The Fifth Circuit found that absent the statements of co-conspirators, the case against Diecidue was "built of supposition on a foundation of inference." 603 F.2d at 555. Carbone's taped statements provide a direct link to his involvement in controlling taverns and his personal role in the related extortion of Weinstein. The government established the requisite connection to permit admission of co-conspirators' statements.

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[14]Carbone told Weinstein that he could describe, in "very authentic" detail, Weinstein's assault. He stated that Weinstein was "hollerin" and he "heard him." He related details about the assault and that the assailant was "supposed to get paid by the limb" but his weapon broke.

b. SUFFICIENCY OF EVIDENCE

John Carbone, Joe Carbone, Zemek, Caliguri, and Janovich challenge directly the sufficiency of the evidence under Count 1.[15] Once the facts are established, viewed in the light most favorable to the government, the test for sufficiency is whether jurors could reasonably decide to act in their own serious affairs on factual assumptions as probable as the conclusion the defendants were guilty beyond a reasonable doubt. *United States v. Price*, 623 F.2d 587, 591 (9th Cir. 1980).

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[15]Although Mazzuca attacks the admission of certain evidence, *see* note 18, *infra*, he does not directly challenge the sufficiency of the evidence as to count 1. He does assert that a conspiracy to obstruct state gambling laws, 18 U.S.C. § 1551, is not properly chargeable as a predicate crime of a RICO conspiracy under 18 U.S.C. § 1962(d). He argues inclusion thereof creates a "conspiracy to conspire" which is void for vagueness.

RICO itself has consistently withstood constitutional challenges as void for vagueness. *See, e.g., United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). The essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering. "Pattern" is expressly defined as two or more predicate offenses. 18 U.S.C. § 1961(1) lists several acts of racketeering including violation of 18 U.S.C. § 1511. 18 U.S.C. § 1961(1)(B). *Cf. United States v. Weisman*, ____ F.2d ____ (2d Cir., Nos. 79-1315, 79-1318, April 4, 1980) (conspiracy can be properly charged as predicate act under 18 U.S.C. § 1962(c) when it involves any of the substantive offenses listed in § 1961(1)(D)).

Count 1 did not charge appellants with a conspiracy to conspire. *Cf. United States v. Feliziani*, 472 F.Supp. 1037, 1042 (E.D.Pa. 1979), aff'd, 622 F.2d 580 (1980) (evidence sufficient to support convictions under both 18 U.S.C. § 1962(d) and § 1511).

Mazzuca further objects to application of RICO as unconstitutional, citing *Griswold v. Connecticut*, 381 U.S. 479 (1965). Absent development of authority and some relation to the facts of this case, we decline to hypothesize constitutional defects.

In measuring a conspirator's complicity, the court must decide if there was sufficient evidence to conclude: (1) the charged conspiracy existed; (2) defendant had at least a "slight" connection therewith; and (3) defendant knew he was connected with the charged conspiracy. *United States v. Smith*, 609 F.2d 1294, 1297 (9th Cir. 1979). Appellants focus upon the final element. The evidence against each will be reviewed individually.

John Carbone's primary argument is that he had retired from the tavern and bail bonding businesses and his only business interest during the relevant period was Vista Auto Sales. There is a significant body of credible, circumstantial evidence that he retained both financial and personal control of several enterprise operations. As discussed above, the most damaging evidence against him was his own taped statements to Weinstein intimating his involvement in illegal activities. Carbone also told of "unloading" money on politicians with the tacit understanding that help would be forthcoming when needed.

Carbone claimed that Janovich would do anything he wished. He bragged that Williams "performed" for him and had made him a millionaire. In taped conversations, Zemek and Williams indicated they perceived Carbone as their superior. There was evidence Williams frequently visited Vista Autos, often prior to making business decisions. John Carbone met privately with Williams and Janovich several times at the office of his attorney.

In April 1977, a disco-restaurant in competition with an enterprise operation was destroyed by fire. Carbone's attorney testified that when co-defendant Levage attempted to retain him to defend arson charges in state court, he was told that John Carbone and Williams would pay the fee.

Vista Autos, an acknowledged Carbone operation, served as the communication center for the planned bombing of Night Moves. John was observed listening to the crucial phone conversation with the bomber for a short time. A few hours later he was observed leaving Joe Carbone's Flitter In accompanied by Williams who carried the identifying signal requested by the bomber.

Carbone does not challenge the evidence as to the Weinstein extortion, relying upon his multiple conspiracies argument rejected above. The record does not support his assertion that there was no evidence against him except as to the Weinstein counts. There was abundant evidence of his connection with the conspiracy revealing his role as a financier and overseer of the enterprise.

Joseph Carbone asserts that he and Williams were "mere associates" and he was not involved in the plots and schemes attributable to Williams. The relationship between Williams and Joe was more than a mere association. Both were insured together for two establishments, Flitter In and Back Door Disco. Williams referred to Joe as his "partner" in topless clubs.

Prior to taking retaliatory actions against a competitor, Williams stated he asked Joe to verify that the "target" did not operate under the protection of an alleged Mafia figure in an adjoining county. John Carbone frequently referred to "Joe and Ron [Williams]" when speaking to Weinstein about his business affairs. We reject Joe Carbone's "mere association" argument.

The government produced evidence of Joe's involvement in "torching" a tavern owned by his father which was experiencing bad business.[16] His topless dancing

[16] *See* pp. 35-38, *infra.*

operation, the Flitter In, was in direct competition with Night Moves. There was ample evidence of his involvement in the bomb plot against Night Moves. We find sufficient evidence from which the jury could conclude beyond a reasonable doubt that Joseph Carbone was a knowing member of the conspiracy.

Zemek characterizes the evidence against him as merely indicative of associational ties with the primary actors. He dismisses his taped admissions as "drunk talk" and false bravado. His intimate knowledge of many details belies this purported defense.

On tape Zemek admitted involvement in a firebombing of the Night Moves tavern and his responsibility for one fire at Weinstein's residence. He told of taking money to co-defendant Levage, imprisoned on a state conviction for burning a competing disco.

Zemek solicited Valentine to set fire to a tavern which Williams and he had been unable to acquire. There was sufficient evidence to permit an inference that he was then working for the enterprise.

The Fourth Circuit has said that the "conduct or participate" language in § 1962(c) requires proof of involvement in the operation or management of the RICO enterprise. *See, e.g., United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir.), rev'd on other grounds, 602 F.2d 653 (1979) (en banc) *cert. denied*, 100 S.Ct. 1647 (1980). Zemek's assertion that he was unaware of the scope of the enterprise and did not agree to conduct its affairs ignores his active participation and his solicitation efforts. That he knew the structure of the organization is clear from his statement that Williams was owned or controlled by "Dagos", an admitted reference to the Carbones, particularly John. There was ample evidence of Zemek's participation and involvement in the operation of the enterprise.

Caliguri asserts the evidence did not establish that he was a knowing member of the conspiracy. He was identified as the masked intruder who broke into the home of competitor Ron Chase and threatened the occupants if the Chases continued their topless dancing business. He was also identified as the person who tailed Chase.

There was evidence that Caliguri executed Joe Carbone's order to "do something about" an enterprise tavern experiencing bad business. Shortly after that directive, the tavern was destroyed by fire. Caliguri was also active in the plot to blow up Night Moves. When he was arrested, agents found a shaving kit in Caliguri's car containing his gun and the home phone numbers of John and Joe Carbone and Williams. The evidence established Caliguri was a knowing and willful conspirator.[17]

Sheriff Janovich strenuously asserts that he was but an acquaintance of the principals herein. The evidence showed a long-term relationship between John Carbone and Janovich. John Carbone's attorney testified to several meetings between Janovich, Carbone and Williams at his office. Janovich arranged an introduction and meeting between John Carbone (ostensibly retired) and the jail superintendent of an adjoining county to discuss expanding the Carbone bail bond business. Carbone bragged of his control over Janovich.

In 1976 Janovich arranged a meeting between Williams and an assistant attorney general directing the state's organized crime unit. On tape, Williams

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[17]Caliguri claims that the government proved that he conspired to commit only one predicate crime. The evidence showed that in fact he agreed to commit a substantial number of predicate crimes on behalf of the enterprise. Appellant conspired to commit a *series* of predicate crimes against Night Moves (arson, extortion, bombing). He was also aided in three separate instances of mail fraud. *See* pp. 35-38, *infra*.

revealed that Janovich had warned him of federal "heat" in the spring of 1978.

The indictment assigned Janovich both protection and harassment roles. There was some evidence of his involvement in an "emphasis patrol" of an enterprise competitor, culminating in visits by fifteen law enforcement personnel within a thirty-minute period. The government presented circumstantial evidence of Janovich's efforts to stifle arson investigations. On tape Williams suggested that if business were poor, a tavern could be "torched" and the sheriff would limit investigation.

The most damaging evidence against Janovich was taped conversations regarding the protection aspect of the conspiracy. Therein he acknowledged his awareness of a warning system and his intent not to interfere in illegal gambling operations. That a price was exacted for such cooperation is clear. One gambling operator at an enterprise tavern testified that Janovich pocketed a $100 payment which the "donor" intended for protection. Janovich also accepted $1,300 from the undercover agent posing as the buyer of Mr. Lucky's.

Janovich testified that he accepted these payments as campaign contributions yet they were not reported on campaign disclosure forms. Indeed, no record was made of their receipt. The jury could reject his explanation as implausible. *See United States v. Young*, 573 F.2d 1137, 1139 (9th Cir. 1978) (it is the exclusive function of the jury to weigh the credibility of witnesses). Janovich's actions were those of a "knowing participant." *See United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (county attorney agreed to give advance notice of raids to prostitution ring in return for cash payments and free services).

There was sufficient evidence to support the conviction of each appellant under count 1.[18] We now examine the other challenged counts.[19]

HOBBS ACT

Count 6 charged Zemek, Caliguri, John and Joe Carbone and Williams with violating 18 U.S.C. § 1951 by attempting to obstruct interstate commerce by extortion to obtain the goodwill and customer revenues of a competing tavern, the "Night Moves", owned by Ron Chase. The elements of a Hobbs Act violation are extortion and a nexus with interstate commerce. *Stirone v. United States*, 361 U.S. 212 (1960).

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[18]Mazzuca challenges admission of certain evidence pertaining to overt acts in the count 1 conspiracy. Overt acts need not be criminal but must be in furtherance of the conspiracy. *United States v. Young*, 573 F.2d 1137 (9th Cir. 1978). If evidence of other misconduct tends to prove some element of the crime charged, such as knowledge, intent, motive, design or scheme, it may be admissible.

Once the trial court determines evidence of extrinsic acts is relevant, it must weigh the probative value of the evidence against its prejudicial effect and that determination is not disturbed absent an abuse of discretion. *United States v. Riggin*, 539 F.2d 682 (9th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). An important consideration in this process is whether the other acts are closely connected in time and nature to the offense charged. We find such a connection. The district court did not abuse its discretion in admitting the challenged evidence.

[19]Only Williams and John Carbone were sentenced to terms to be served consecutively with the count 1 sentence. *See* note 6 *supra*. As to the Carbones, Williams and Mazzuca, the practical effect of reversal on any of the remaining counts would be a reduction in fines.

The court imposed concurrent sentences and assessed no fines against Janovich, Zemek, and Caliguri. Nevertheless, the nature of the charges and the complexity of the case compel us to examine the challenges as to the remaining counts rather than invoke the concurrent sentence doctrine.

Extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). The alleged forceful acts include damaging the tavern with a Molotov cocktail in November 1977; destroying Night Moves by fire in February 1978; tailing the owners of the tavern; breaking into their home and threatening the occupants in August 1978; and plotting to blow up the tavern in November 1978.

Zemek, Caliguri and Williams argue no violation was established because: (1) no "property" was obtained or sought; (2) no wrongful inducement was employed; and (3) the Chases did not consensually yield any property. All five appellants argue the evidence was insufficient.[20]

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[20]Caliguri also asserts no interstate commerce nexus was established. The effect on interstate commerce need only be *de minimis*. An actual effect is not required for an attempted Hobbs Act violation; the effect need only be "probable" or "potential." *See United States v. Phillips*, 577 F.2d 495 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). *See also, United States v. Brooklier*, 459 F.Supp. 476 (C.D. Calif. 1978).

There was evidence the Chases purchased supplies and hired employees from out-of-state. Threatened depletion of resources from a business engaged in interstate commerce provides an adequate jurisdictional base. *United States v. Phillips, supra.* The jury was so instructed (No. 18). It is not necessary that the subject of the extortion constitute commerce, only that commerce be affected in some way. *Carbo v. United States*, 314 F.2d 718, 732 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). *See also United States v. Staszcuk*, 517 F.2d 53 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972).

Appendix A
Opinion of United States Court of Appeals

1. INTANGIBLE PROPERTY

The concept of property under the Hobbs Act has not been limited to physical or tangible "things." The right to make business decisions and to solicit business free from wrongful coercion is a protected property right. *See, e.g., United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) (right to make business decisions free from outside pressure wrongfully imposed); *United States v. Nadaline*, 471 F.2d 340 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973) (right to business accounts and unrealized profits); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) (right to solicit business free from territorial restrictions wrongfully imposed by competitors). *Cf. United States v. Hathaway*, 534 F.2d 386, 395 (1st Cir.) *cert. denied*, 429 U.S. 819 (1976) (rejection of narrow perception of "property"); *Battaglia v. United States*, 383 F.2d 303 (9th Cir. 1967), *cert. denied*, 390 U.S. 907 (1968) (right to lease space in bowling alley free from threats).

The trial court instructed the jury using the following language from *United States v. Tropiano, supra*, 418 F.2d at 1075: property includes "any valuable right considered as a source or element of wealth". No exception was noted. Chase's right to solicit business free from threatened destruction and physical harm falls within the scope of protected property rights under the Hobbs Act.

2. COERCION

It is difficult to view the acts directed against the Night Moves and its proprietor as non-coercive. Threatened force may encompass fear of economic loss as well as physical violence. *See* Instruction No. 36. *Cf. United States v. Gates*, 616 F.2d 1103, 1106 (9th

Cir. 1980) (inducing payments to avoid county business tax).

Appellants expressly communicated their purpose when a man, later identified as Caliguri, broke into the Chases' home, bound the occupants, and threatened to kill them if they did not give the Chases a message to "leave town." He warned that it was futile to reopen Night Moves because it would "come down again". The Chases had rebuilt the tavern after it was destroyed by a fire arranged by Williams in February 1978.

3. CONSENT

Appellants' argument that the convictions must be reversed because Chase was not induced to give up property "*with his consent*" ignores the fact that count 6 charged attempted extortion. The jury was so instructed.

To prove the substantive act of attempted extortion there must be proof of an attempt to instill fear. *Carbo v. United States*, 314 F.2d 718, 741 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). Evidence of the previously described acts of intimidation and violence suffices. Appellants' objective was to induce Chase to give up a lucrative business. The fact that their threats were unsuccessful does not preclude conviction.

4. CRIMINAL LIABILITY

On this and other substantive counts, the indictment charged liability as an aider and abettor and as a principal. 18 U.S.C. § 2. The jury was instructed on the complicity theory. Conviction as an aider and abettor requires proof the defendant willingly associated himself with the venture and participated therein as something he wished to bring about. *See United States v. Groomer*, 596 F.2d 356 (9th Cir. 1979). A review of the

record reveals substantial evidence that appellants associated with and participated in the efforts against Chase.

John Carbone's primary connection to the Night Moves plot involves the November 1978 scheme to blow up the tavern. Vista Autos was the site of a crucial phone conversation with the bomber. The bomber discussed his demands, and requested the "contact" carry a paper bag for identification. John was present and listened briefly. A few hours later he was observed leaving Joe Carbone's Flitter In with Williams. Williams was carrying the requested paper bag. When Caliguri was arrested at a rendezvous with the bomber, agents found notes with the home phone numbers of John and Joe Carbone and Williams.

Ron Chase testified that Joe Carbone's Flitter In and Night Moves were two of only four topless dancing taverns in the county. Carbone and Chase directly competed for dancers and customers. Joe Carbone and his sometime employee, Caliguri, visited the Night Moves after it opened. Caliguri was in Joe's employ when he tailed the Chases and broke into their home. Joe entered Vista Auto's office during the crucial phone conversation and listened to the final minutes. His home phone number was also found on Caliguri.

Caliguri was seen tailing the Chases in a Vista Autos car, even though he was not at that time employed by the dealership. He was identified at trial as having entered the Chases' home and threatened its occupants. He was arrested while serving as a go-between in the November 1978 bombing plot.

On tape Zemek admitted involvement in the Molotov cocktail incident at Night Moves. In a taped conversation he revealed his awareness of the Chases rebuilding efforts after the February 1978 arson and of the efforts to drive Chase out of business.

Williams asked Valentine to arrange for the arson of Night Moves because it drew business from Mr. Lucky's. Co-defendant Bentley admitted setting the fire. Before soliciting the arson, Williams indicated he had asked "Joe" to make sure Chase did not operate under the protection of a well-known nightlife figure in the adjoining county. In November 1978 Williams solicited help from an undercover agent in finding a bomber to destroy Night Moves.

This evidence more than satisfied the government's burden to prove active participation and willful association as to Zemek, Caliguri and the Carbones. The government established compelling evidence of Williams' participation as a principal in soliciting arson and arranging a bombing.

OBSTRUCTING COMMUNICATION TO A CRIMINAL INVESTIGATOR

John Carbone and Williams were charged under 18 U.S.C. § 1510 with willfully endeavoring to obstruct communication of information relating to criminal violations, by attacking the property (count 7) and person (count 8) of Jerome Weinstein, the person they believed had given information to the IRS. Zemek was also charged under count 7.

Although the IRS had conducted a criminal investigation of John Carbone, Weinstein had not, in fact, been its informant. In January 1977 John Carbone was notified that the IRS investigation had concluded. Certain alleged acts of violence directed at Weinstein occurred thereafter.

Appellants assert these acts do not fall within the statutory proscription of 18 U.S.C. § 1510 because (1) Weinstein was not in fact an informant; (2) retaliatory

acts are not proscribed; or (3) the statute does not cover threats or injuries inflicted *after* an investigation has terminated.

18 U.S.C. § 1510(a) provides:

> Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or
>
> Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator --
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The statute has been construed as requiring proof of specific intent. *United States v. Carleo*, 576 F.2d 846 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978). While the first two paragraphs of § 1510(a) are phrased disjunctively, the indictment and jury instructions in this case were phrased conjunctively (i.e., the government must prove willful endeavor to obstruct communication and injury "on account of" giving information).

1. IDENTITY OF INFORMANT

The identity of the actual IRS informant in 1976 is unknown. Carbone knew Weinstein had information of interest to the IRS and believed he had informed in the past. The government introduced ample evidence of the requisite mens rea supported by several corroborating acts.

Legislative history is silent regarding the necessity of proving a defendant had actual knowledge that an alleged informant had transmitted or would transmit information. The Third Circuit, relying on case law construing similar statutes, has held actual knowledge is not required and a "reasonably founded" belief will suffice. *See United States v. Kozak*, 438 F.2d 1062 (3d Cir.), *cert. denied*, 402 U.S. 996 (1971). *See also, United States v. San Martin*, 515 F.2d 317 (5th Cir. 1975) (defendant knew or "reasonably believed" person had information).

The jury instruction in this case asked whether defendants knew or believed Weinstein was about to give information and had given information in the past. No exception was taken. The jury was also instructed that a mere threat of force unrelated to the communication of information would not violate the act. The jury was adequately instructed. Appellants did not need to succeed in their efforts to prevent or delay communication of information. The statute speaks of "endeavors."

2. RETALIATORY ACTS

We reject appellants' argument that their convictions must be reversed because the statute does not proscribe retaliatory acts. Threats and intimidation may serve two purposes: (1) deterring future communications; or (2) retaliating for past communications. *United States v. Koehler*, 544 F.2d 1326, 1329 (5th Cir. 1977). While threats intended to thwart future communications clearly will support a conviction under § 1510, *United States v. Koehler, supra*, the Fifth Circuit has held that retaliatory threats will not support conviction. *United States v. San Martin*, 515 F.2d at 320.

The present record provides a basis to infer that appellants' purpose in attacking Weinstein was to deter future communications. Weinstein still posed a threat to Carbone. He had financial information of potential interest to the IRS. The IRS maintained a continuing interest in John Carbone. Carbone believed information was or *was about* to be given.

The evidence supports an inference that one purpose was to interfere with future communication of information. Thus, even were we to apply the Fifth Circuit's distinction between retaliation and deterrence, the convictions may be sustained.[21]

3. TERMINATION OF INVESTIGATION

It is not fatal that the IRS *investigation* terminated in January 1977, prior to the alleged acts and threats of violence. Section 1519 does not require "an investigation be taking place" concurrently with the proscribed

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[21]The *San Martin* court stated:

> A literal reading of the provision of the statute under consideration indicates that it is aimed at deterring interference with future communication of information. It does not prohibit the making of a threat, *as opposed to the infliction of bodily injury*, in retaliation for having communicated information to a criminal investigator, at least where such a threat cannot be interpreted as having been intended to interfere with future communication of additional information or with continued cooperation.

515 F.2d at 320 (emphasis added).

The Fifth Circuit's distinction between retaliation and deterrence is arguably limited to 18 U.S.C. § 1510(a) ¶ 1 which speaks of willfully endeavoring to obstruct, delay or prevent communication. Paragraph 2 addressed actual injury "on account of" the giving of information. The instant case involved infliction of bodily injury, not merely the making of a threat.

acts. *See United States v. Lippman*, 492 F.2d 314, 317 (6th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975). The statutory focus is upon an endeavor to prevent communications to federal *investigators.*[22]

4. SUFFICIENCY OF THE EVIDENCE

Neither Williams nor John Carbone directly challenge the sufficiency of the evidence. There was ample evidence as to Williams' complicity. He hired Valentine to set fire to Weinstein's house in May 1978, offered Valentine an assault contract on Weinstein in 1978, and accepted money for protection. Relying entirely on his multiple conspiracies analysis rejected above, John Carbone does not challenge the sufficiency of the evidence as to the counts involving Weinstein.

Zemek was charged under count 7 which alleged damage to Weinstein's property. In taped conversations, Zemek admitted responsibility for arranging a fire of Weinstein's garage door in March 1977. He said the attacks were made because Weinstein was an informant "on some tax deal." There was enough evidence that Zemek was aware of the relationship between the arson and Weinstein's perceived position as a "stoolie" to support his conviction as an aider and abettor.

ILLEGAL GAMBLING BUSINESS

John Carbone, Williams and Mazzuca were charged with operating an "illegal gambling business" in violation of 18 U.S.C. § 1955. Count 9 involved pot limit poker and count 10 involved blackjack. Count 11 charged

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[22]Although the statute requires that the intended recipient of the communications be an "investigator" as defined under the act, (18 U.S.C. § 1510(b)), proof of that element is not challenged.

them and Janovich with a concurrent conspiracy to obstruct state law enforcement to facilitate this gambling business. 18 U.S.C. § 1511. Appellants object to the trial court's instruction defining "gross revenue" and Mazzuca, Carbone and Janovich challenge the sufficiency of the evidence as to specified counts.

1. GROSS REVENUE

Both 18 U.S.C. § 1955 and § 1511 require that an illegal gambling business: (1) violate state law; (2) involve five or more persons; and (3) operate substantially continuously for more than 30 days *or* have gross revenue of $2,000 in any single day. Mazzuca and Janovich question the government's proof of the $2,000 gross revenue option of the third requirement.[23]

The district court's instruction defined gross revenue as "the total amount of money wagered in a single day not restricted to net profit." Appellants do not contend gross revenue should be equated with net profit.[24] Rather, they object to the court's refusal to give a proposed instruction containing this caveat: gross revenue does not include "side bets among players or wagers placed in a common pot." We find no error in the trial court's instruction in light of the evidence.

Courts discussing and rejecting the proposition that gross revenue is restricted to *net profit* broadly define gross revenue as "the total amount wagered" and do not differentiate between wagers placed against the house and wagers among players. *See, e.g., United*

[23]Count 9 of the indictment alleged operation of the pot limit poker games from May 23, 1978 to July 1, 1978. As to this count, the jury was instructed on the 30 day option.

[24]Such an argument would be unavailing in light of *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974) (en banc).

States v. Rotchford, 575 F.2d 166, 174 (8th Cir. 1978); *United States v. Sacco*, 491 F.2d 995, 1001 (9th Cir. 1974); *United States v. Ceraso*, 467 F.2d 653, 656-57 (3d Cir. 1972).

Apparently no court has expressly determined if "gross revenue" excludes side bets.[25] In *United States v. Graham*, 534 F.2d 1357 (9th Cir. 1976), this court suggested that side bets may be excluded from the gross revenue computation. There, as here, however, the record indicated that money was indeed wagered against the house.

The government offered testimony that the house had an interest in all amounts bet at the pot limit poker games: a dollar per pot charge plus a percent of each pot. House dealers would "rake off" the pot. The operation also provided dealers for blackjack and used shills to increase the ante in blackjack and poker games. Their winnings were returned to the house.

No evidence was introduced as to side-betting among or between the players.[26] The court properly instructed the jury and did not err in refusing to give appellants' proposed instruction.

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[25]Cases tried under the 30 day option of 18 U.S.C. § 1955, rather than the $2,000 gross revenue option, do refer to occurrences of side betting. *See, e.g., United States v. Mattucci*, 502 F.2d 883, 886-87 (6th Cir. 1974). *Cf. United States v. Nettles*, 570 F.2d 547, 550 (5th Cir. 1978).

[26]Mazzuca and Janovich also object to the court's allegedly prejudicial limitation of cross-examination of agent Early. Early observed the action and testified as to the betting. A review of the record indicates that the stricken questions, propounded by Mazzuca's counsel, addressed the issue of net profit, not side betting. It is clear that the trial court and co-counsel so construed the area of inquiry. Indeed, co-defense counsel requested a mid-trial instruction clarifying that net profit is not to be equated with gross revenue.

Mazzuca also challenges proof of $2,000 gross revenue as to count 10 (blackjack). Agent Transeth, an accountant, observed the action and conservatively estimated $4,000 in two hours. An undercover agent may observe and testify to the action. *Cf. United States v. Graham, supra.* The record provides sufficient foundation for the estimate. In addition, Williams bragged that $2,000 profit was possible on a good night. Finally, one of the operators testified to action of "a couple thousand" per night.

2. BLACK JACK AND POT LIMIT POKER

Neither Mazzuca nor Williams challenge the sufficiency of the evidence to convict under counts 9 and 10. Both had ownership interests in Mr. Lucky's. Both approached an operator to set up "after hours" pot limit poker games and blackjack games; and both promoted the sale of Mr. Lucky's with the illegal gambling operations.

John Carbone frequently bragged of his profitable relationship with Williams. It is permissible to infer that he referred to on-going ventures in which Williams "performed" for him. John Carbone related to Weinstein that he had a proprietary interest in the illegal gambling business which Williams and Mazzuca operated in the rear of Stan & Ollie's.[27]

Surveillance agents observed Williams consulting with John Carbone before making major decisions. Williams excused himself midway through a preliminary discussion regarding the sale of Mr. Lucky's. He drove to John Carbone's Vista Autos and briefly conferred. Upon his return to Mr. Lucky's, Williams invited the undercover agents to an illegal blackjack game to be held that evening.

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[27]One of the gambling operators testified that Mazzuca told him of a "higher up" in the operation who could be called upon to resolve disputes between Mazzuca and Williams.

In light of this evidence and other circumstantial evidence of Carbone's active role, albeit behind-the-scenes, we cannot say that the evidence was insufficient to establish his complicity in the gambling operations.

3. CONSPIRACY TO FACILITATE ILLEGAL GAMBLING

Mazzuca, Janovich, and John Carbone challenge the sufficiency of the evidence under count 11 charging violation of 18 U.S.C. § 1511 which proscribes a conspiracy to obstruct state law enforcement with intent to facilitate an illegal gambling business.[28] We find sufficient evidence of the existence of a conspiracy and appellants' connection and knowing participation therein.

The government introduced tape recordings in which Mazzuca told the agent posing as a buyer of Mr. Lucky's that he and Williams would provide introductions to political figures who could guarantee no prosecutions or arrests for illegal gambling. Discussions of the protection aspect of the gambling business ensued.

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[28]18 U.S.C. § 1511 provides in part:

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if –

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business.

Williams was also charged under count 11 but does not challenge the sufficiency of the evidence.

When a gambling operator complained about the necessity of "contributing" $100 to Janovich, Mazzuca said he had given $300. In a meeting with the undercover agent, Janovich expressed satisfaction that Mazzuca would remain at Mr. Lucky's after the sale. Mazzuca's argument that he was not a knowing participant is rejected.

Janovich asserts that the evidence established only a "mere association" with co-defendants and that his acceptance of money from the undercover agent established a separate conspiracy.

There was ample evidence that Janovich agreed to provide protection for the gambling operations as well as to harass would-be competitors. *See United States v. Panzanella*, 416 F.Supp. 68 (W.D. Pa. 1976). His role in facilitating the gambling operation was established by testimony and his taped statements.

One operator testified that Williams assured him of protection from arrest because the sheriff was "in his hip pocket." If a raid was planned, they would receive two-hour advance notice. Taped statements by co-conspirator Williams refer to the sheriff's complicity. Williams arranged the initial meeting between Janovich and the agent posing as a buyer of Mr. Lucky's. Williams solicited $300 from the agent to be passed to Janovich. After the meeting, Williams reported that the sheriff would do business but wanted money "right away" without any "heat." At the second meeting, Janovich acknowledged receipt of the first payment. He accepted $1,000 cash from the agent at this meeting.

Janovich's familiarity with the warning system and his intent not to enforce gambling laws to the detriment of enterprise operations were apparent in taped conversations. The evidence showed he was a member of the conspiracy to obstruct state gambling laws, as

opposed to merely knowing and associating with the co-conspirators. *See United States v. Crockett*, 514 F.2d 64, 75 (5th Cir. 1975). His dealings with the agent did not form a separate conspiracy, but were acts in furtherance of a continuing conspiracy by inducing the "buyer" to become a new participant.

The government contends that John Carbone's role in the gambling protection conspiracy is confirmed by his relationship with Williams, his experience in providing protection, and his frequent solicitations for money for the sheriff's office to promote his "program."

Carbone told Weinstein that his business required that he give large amounts of money to politicians with the tacit understanding that help would be available. He bragged of his experience in arranging protection, insulating himself by dealing two or three people away.

Carbone regularly held meetings at his attorney's offices attended by Williams, Janovich and two of the sheriff's ranking subordinates. He told Weinstein the sheriff had removed a detective from active duty because he was "nosing around" too much. He frequently pressured his attorney for contributions to maintain his "program" with the sheriff's office.

The evidence was sufficient to show Carbone's connection to the conspiracy.

MAIL FRAUD

Counts 15 through 17 involve the October 1977 arson at an enterprise tavern, the Black Knight, and an alleged scheme to defraud insurance companies

necessitating use of the mails.[29] John and Joe Carbone and Caliguri were convicted under these counts. All challenge the sufficiency of the evidence.

The essential elements of mail fraud are a scheme to defraud and knowing use of the mails to execute that scheme. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Beecroft*, 608 F.2d 753 (9th Cir. 1979).

No one asserts that a plan to deliberately set a business on fire to obtain insurance proceeds would not constitute a scheme to defraud. Nor is it argued that mailing of the proceeds was insufficiently related to the scheme to defraud.

Appellants do challenge the sufficiency of the evidence to establish their participation in or knowledge of the mail fraud scheme. Appellants' intent can be inferred from their statements and conduct, *United States v. Beecroft*, 608 F.2d at 757, and from their knowledge that the scheme operated in a deceitful manner. *United States v. Piepgrass*, 425 F.2d 194, 199 (9th Cir. 1970).

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[29]18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

There was evidence that John Carbone, not his son Richard, was the actual owner of the Black Knight. Williams borrowed money for the initial purchase in 1974. Thereafter John Carbone obtained a loan using the proceeds to pay Williams. Although Richard co-signed the note, John was the sole signatory on renewals.

The Black Knight was located in the Pierce County town of Puyallup and was its only topless dancing establishment. It shared topless dancers with Joe Carbone's topless clubs. Indeed, Joe often gave advice to the manager.

In June 1977, insurance on the tavern's contents was increased from $35,000 to $65,000 purportedly at Williams' request, although the authenticity of the signature is questioned. The government introduced evidence that business at the Black Knight was slack. Joe Carbone was planning to open a new topless tavern in Puyallup in the fall of 1977.

One of Joe Carbone's dancers testified that she overheard a conversation between Joe and Caliguri two weeks before the fire in which Joe stated that business was bad at the Black Knight and asked Caliguri to "take care of it." Three days before the fire, the tavern received a notice of violation for lewdness which could have required a temporary closure.

The tavern was destroyed by fire on October 30, 1977. Fire investigators eliminated all possible accidental causes. One week later Joe Carbone opened his new topless tavern in Puyallup.

Richard Carbone, the nominal owner of the Black Knight, took little interest in the fire or its aftermath. By contrast, John Carbone asked the insurance adjuster for fast action on the claim. Williams made several calls to the insurance company "for John." The proceeds, totalling $33,000, were used to pay John's note for the purchase.

There was sufficient proof of John Carbone's financial interest in the tavern and the insurance proceeds. There was evidence to support the government's theory that Joe ordered the arson, motivated by the tavern's poor business and his plans to open a new topless tavern nearby. Evidence of motive and opportunity was abundant. The method chosen corresponded to prior "torchings" of enterprise businesses.

Contrary to his assertions, Caliguri was not a "neutral relation" of the principal actors. As prior manager of enterprise taverns, he was aware of insurance coverage for fire loss. John Carbone told Weinstein the Black Knight fire was done by a professional. There was evidence Caliguri was one of two men involved in the February 1978 arson of competitor Night Moves. While acting as an assistant for the Night Moves bomber, he stated that he had prior experience in destroying businesses.

This evidence and testimony that he was ordered to do something about the Black Knight less than two weeks before its destruction, support his conviction as an aider and abettor. The prosecution theorized Caliguri was aware of a high probability of fraud. He could not deliberately close his eyes to avoid learning the truth. *See United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978). The evidence supports this conviction.

CONCLUSION

Appellants, jointly and singly, raise additional objections. We have carefully received the record and find no merit to their contentions.

Appellants strenuously object to the district court's denial of their severance motions. Fed.R.Cr. Pro 14. Assuming they properly preserved their objections

by renewing the motions at the close of all the evidence, *see United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977), we find no abuse of discretion in refusing to sever the trials.[30]

Janovich asserts that the trial judge engaged in improper prosecutorial conduct when he questioned a witness. He cites but one incident occupying five pages of a transcript exceeding 8,000 pages.

The court may examine a witness to clarify testimony if it avoids the appearance of partiality. *United States v. Allsup*, 566 F.2d 68, 72 (9th Cir. 1977). The challenged colloquy was well within the bounds of proper questioning. Janovich's objections to the grand jury proceedings are similarly without merit.

Williams' argument against forfeiture of his interest in Mr. Lucky's tavern pursuant to 18 U.S.C. § 1963(a), is merely derivative. It fails because his RICO conviction is affirmed.

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[30]Spillover and inability to compartmentalize are the primary objections of Zemek, Janovich, Joe Carbone and Caliguri. We assume the jury follows limiting instructions to compartmentalize the evidence as to each defendant. *United States v. Escalante*, ____ F.2d ____, (9th Cir., No. 78-2794, April 29, 1980). Such instructions were given during trial and before deliberations. There is no indication the jury was unable to appraise the evidence against each defendant in accord with the court's admonitions and instructions. *See United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). Of the eight persons jointly tried, one (Levage) was acquitted.

Although the quantum of evidence as to certain defendants may have been greater than that as to others, such a disparity has been considered significant only when conspiracy charges were dismissed during trial. *See United States v. Polizzi*, 500 F.2d 856, 902, n. 11 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

Caliguri objects to discretionary evidentiary rulings and asserts that prejudicial outbursts from prosecution witnesses necessitated a mistrial. This was a protracted trial involving numerous charges, defendants and lawyers. Nonetheless, the record is remarkably free of even harmless error, let alone prejudicial error. The judge gave appropriate limiting instructions. Any error was harmless.

The district court judgment is affirmed. The mandate will issue at once. Release on bail as to any defendant is revoked now.

APPENDIX B
JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NO. CR78-97T(S)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK JULIUS MAZZUCA,

Defendant.

On this 13th day of July, 1979, came the attorney for the Government and the defendant appeared in person and with his counsel, Bill Lanning.

IT IS ADJUDGED that the defendant upon his plea of NOT GUILTY, and a jury verdict of GUILTY, has been convicted of the offenses of violation of Title 18, United States Code, Section 1962(d) (COUNT I), Section 1955 and Section 2 (COUNTS IX and X), and Section 1511 (COUNT XI), as charged in the Superseding Indictment returned on February 27, 1979, and

APPENDIX B
JUDGMENT AND COMMITMENT

the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED as to COUNT I that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS and fined the sum of $25,000.00.

IT IS ADJUDGED as to COUNT IX that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS and fined the sum of $2,000.00. Said sentence on COUNT IX as to imprisonment only to run concurrently with sentence on COUNT I.

APPENDIX B
JUDGMENT AND COMMITMENT

IT IS ADJUDGED as to COUNT X that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS and fined the sum of $2,000.00. Said sentence on COUNT X as to imprisonment only to run concurrently with sentence on COUNT I.

IT IS ADJUDGED as to COUNT XI that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS and fined the sum of $1,000.00. Said sentence on COUNT XI as to imprisonment only to run concurrently with sentence on COUNT I.

IT IS FURTHER ORDERED that costs of prosecution are assessed against the defendant. The United States is ordered to file a bill of costs within ten (10) days of this judgment. The defendant will file any objections

APPENDIX B
JUDGMENT AND COMMITMENT

to the bill of costs within ten (10) days following the filing of the bill of costs by the United States. Upon approval of any cost bill by the Court the judgment will be amended to reflect the costs ordered.

IT IS FURTHER ORDERED that the Indictment in Cause No. CR78-97T, returned on December 3, 1978, is hereby dismissed upon the motion of the United States Attorney.

IT IS ORDERED that the defendant will remain free on bond of $100,000.00 pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DATED this 17th day of July, 1979.

MORELL E. SHARP
UNITED STATES DISTRICT JUDGE

Presented by:

JOHN C. MERKEL
United States Attorney

APPENDIX C
ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-1550

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

FRANK JULIUS MAZZUCA,

Defendant/Appellant.

Before: WRIGHT and SNEED, Circuit Judges.

Judges Wright and Sneed have voted to reject the petition and suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition and suggestion for a rehearing en banc is rejected.

18 USC § 1961 DEFINITIONS

As used in this chapter -

(1) "Racketeering activity" means (a) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (b) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503

APPENDIX D
18 USC § 1961 DEFINITIONS

(relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (c) any act which is indictable under title 29, United States Code, section 186 (29 USCS § 186) (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (29 USCS

APPENDIX D
18 USC § 1961 DEFINITIONS

§ 501(c)) (relating to embezzlement from union funds) or (d) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States. Any political subdivision, or any department, agency or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

APPENDIX D
18 USC § 1961 DEFINITIONS

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" . . .;

(7) "racketeering investigator" . . .;

(8) "racketeering investigation" . . .;

(9) "documentary material" . . .;

(10) "Attorney General" . . ..

APPENDIX E

18 USC § 1962. PROHIBITED ACTIVITIES

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18 United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their

APPENDIX E
18 USC § 1962. PROHIBITED ACTIVITIES

accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

APPENDIX E

18 USC § 1962. PROHIBITED ACTIVITIES

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

APPENDIX F
JURY NOTE

15 Feb. 1979

Your Honor

(1) The jury is having difficulty with the second paragraph of Instruction No.26. One group interprets the first sentence "Concerning the second element ..... enterprise." as meaning that each accused agreed to participate in two specific acts (i.e., a pattern of racketeering). The second group interprets the same sentence as meaning that the accused agreed to participate in the affairs of an enterprise, and that the enterprise itself need only be involved in two racketeering acts regardless of whether the accused agreed to participate in those acts or not.

(2) A second controversy concerns a conflict between the 3rd paragraph (beginning 1.18) on the second page of Instruction No.25, and the paragraph already referred to above in Instruction No.26 (beginning on line 16). The former uses the phrase "essential nature";

APPENDIX F
JURY NOTE

the latter says nothing of that. Could you define "essential nature" in this case for us, or must we decide this for ourselves - e.g., if the "essential nature" specifically means control of the tavern business in Pierce County, then certain conclusions might or might not be drawn.

Manfred Lindner
Foreman

APPENDIX G
COURT'S RESPONSE TO JURY NOTE

In answer to specific questions, such as the two submitted by you, you must understand that the Court's answers thereto have to be read in the context of all of the instructions as a whole. The jury should bear in mind that undue emphasis may not be placed on any instruction.

In answer to your first question, each of the accused must agree to participate, directly or indirectly, in two or more specified acts of racketeering in furtherance of the aims of the enterprise.

In answer to the alleged conflict between the third paragraph on the second page of Instruction No.25 and the second paragraph of Instruction No.26, all of the definitions and requirements in Instruction No.25, including the requirement of "knowledge of the essential nature of the plan," are applicable to Instruction No.26.

APPENDIX G
COURT'S RESPONSE TO JURY NOTE

To convict a defendant as a conspirator, the Government is required to show only that the defendant acted with full knowledge of the general scope and purpose of the conspiracy. It is not necessary for the defendant to have had knowledge of the entire plan of the conspiracy. It is up to the jury to determine the essential nature of the plan, bearing in mind the charges in the Indictment, the evidence, and the instructions of the Court.

Judge Sharp
June 16, 1979
10:15

APPENDIX H
GENERAL VERDICT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
AT SAN FRANCISCO

NO. CR79-0068 MS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN JOSEPH CARBONE, et al,

Defendants.

WE, THE JURY, find the defendant FRANK JULIUS MAZZUCA

guilty as charged in Count I of the Indictment;

guilty as charged in Count IX of the Indictment;

guilty as charged in Count X of the Indictment;

guilty as charged in Count XI of the Indictment.

19 June 1979

MANFRED LINDNER
Foreperson

NO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

FRANK JULIUS MAZZUCA

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent

CERTIFICATE OF SERVICE

ROBERT S. BRYAN, counsel for petitioner and a member of the bar of this Court, certifies that pursuant to Rule 28.3, .4 and .5(b) he served the within Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals on counsel for respondent by enclosing three copies thereof in an envelope, postage prepaid, first-class, addressed to:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.S. 20530

and depositing same in the United States mails at Seattle, Washington, on March 6th, 1981, and further certifies that all parties required to be served have been served.

ROBERT S. BRYAN
Attorney for Petitioner

FILED
MAY 13 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1517, 80-6307, and 80-6309

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK JULIUS MAZZUCA, PETITIONER

v.

UNITED STATES OF AMERICA

RONALD JOHN WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE V. JANOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the group of tavern owners and others associated in this case for the purpose of operating and controlling the local tavern business constituted an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* (all petitioners).

2. Whether tape recordings of conversations between petitioner Janovich and an undercover federal agent should have been excluded from evidence because they were not authorized by state law (petitioner Janovich).

3. Whether the district court erred in admitting the out-of-court statements of two unindicted co-conspirators (petitioner Janovich).

4. Whether the proof at trial established multiple conspiracies rather than the single conspiracy charged in the indictment (petitioner Janovich).

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1517

FRANK JULIUS MAZZUCA, PETITIONER

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UNITED STATES OF AMERICA

No. 80-6307

RONALD JOHN WILLIAMS, PETITIONER

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UNITED STATES OF AMERICA

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GEORGE V. JANOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 634 F. 2d 1159.

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[1]"Pet. App." refers to the appendix to the petition in No. 80-1517.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1980. A petition for rehearing was denied on January 7, 1981. The petitions for a writ of certiorari were filed as follows: No. 80-1517, on March 6, 1981; No. 80-6307, on March 7, 1981; No. 80-6309, on March 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner Williams was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count II); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count I); four counts of interfering with interstate commerce by threats or violence, in violation of 18 U.S.C. 1951 and 2 (Counts III-VI); two counts of obstructing a criminal investigation, in violation of 18 U.S.C. 1510 and 2 (Counts VII and VIII); two counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 and 2 (Counts IX and X); one count of obstructing state law enforcement, in violation of 18 U.S.C. 1511 (Count XI); and two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts XIII and XIV). Petitioners Mazzuca and Janovich were each convicted on the counts involving RICO conspiracy and obstruction of state law enforcement. In addition, petitioner Mazzuca was convicted on both counts of conducting an illegal gambling business.

Petitioner Williams was sentenced to concurrent terms of 20 years' imprisonment on Counts I and II and to five-year terms of imprisonment on each of the 11 remaining counts, to be served concurrently with each other but consecutively to the sentences on Counts I and II; he was also fined a total of $162,000, and his interest in a tavern involved in the

racketeering violations was forfeited to the United States under 18 U.S.C. 1963(a). Petitioner Mazzuca was sentenced to concurrent terms of 15 years' imprisonment on Count I and five years' imprisonment on each of the three remaining counts, and he was fined a total of $30,000. Petitioner Janovich was sentenced to concurrent terms of 12 years' imprisonment on Count I and five years' imprisonment on Count XI. The court of appeals affirmed (Pet. App. 1a-45a).

The extensive evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-6a, 13a-15a, 20a-24a, 29a-30a, 34a, 37a-40a, 42a-43a). In brief, it established the existence of an informal association of tavern owners and others in Pierce County, Washington, which advanced the tavern businesses of its members through murder, arson, bribery, gambling, mail fraud, extortion, and obstruction of criminal investigations (*id.* at 2a). The criminal activities of the association are outlined in our opposition to the petition for a writ of certiorari filed by petitioners' co-defendants, John Carbone and Joseph Carbone. See *Carbone* v. *United States*, cert. denied, No. 80-900 (Feb. 23, 1981).[2]

Petitioners Williams and Mazzuca owned taverns in Pierce County and were members of the Carbone organization (Pet. App. 2a, 37a); Williams was the "chief lieutenant" of the organization (*id.* at 2a). Between 1972 and 1977, the organization arranged for various taverns owned by its members to be burned down in order to collect the insurance proceeds; thereafter, the mortages and debts were paid, and the premises were remodeled or new establishments were opened nearby (*id.* at 3a & n.1). In addition, federal undercover agents infiltrated gambling activities at

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[2]Copies of our opposition in *Carbone* are being provided to counsel for petitioners.

two taverns in which Williams and Mazzuca had an ownership interest; gambling at these establishments included blackjack and pot limit poker games, which were illegal under state law. Williams and Mazzuca also actively participated in negotiations to sell one of these taverns to an undercover agent posing as a potential buyer, and they informed the agent that a price could be arranged to include law enforcement "protection" by the sheriff's office; thereafter, Williams arranged a meeting between the agent and petitioner Janovich, the Sheriff of Pierce County. Moreover, following the closure of three taverns owned by members of the organization for topless dancing violations, Williams arranged for the attempted assassination of the responsible state liquor control board supervisor. Finally, Williams was involved in a scheme to blow up a tavern owned by a competitor of the organization's members (*id.* at 4a-6a, 29a-30a, 38a-39a).

Petitioner Janovich, the Sheriff of Pierce County, assisted the organization by providing law enforcement "protection" for its activities and harassing its competitors. For example, Janovich refrained from interfering in the organization's illegal gambling operations and accepted $1,300 for "protection" from the undercover agent posing as a buyer of the tavern owned by petitioners Williams and Mazzuca. Janovich also inhibited arson investigations into the organization, arranged a meeting between Williams and an assistant attorney general directing the state's organized crime unit, afforded advance notice of planned raids, and warned Williams of federal "heat." In addition, Janovich was involved in an "emphasis patrol" of the tavern of a competitor, culminating in visits to the tavern by 15 law enforcement personnel within a 30-minute period (Pet. App. 3a, 14a, 23a-24a, 39a-40a).

ARGUMENT

1. Petitioners contend (Mazzuca Pet. 16-24; Williams Pet. 5-7; Janovich Pet. 7-9) that the conduct for which they were charged and convicted does not fall within the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* They argue that the RICO counts were based on an alleged "enterprise" having no legitimate purpose, and that the RICO statute is applicable only to legitimate enterprises that are subsequently corrupted by racketeering activity.

As petitioners recognize, the issue whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an enterprise under RICO is currently before this Court in *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981). However, as we explained in our opposition to the petition for a writ of certiorari in *Carbone* v. *United States, supra*, in which petitioners' co-defendants raised the same claim asserted here, the court of appeals correctly held that the association in this case "satisfies the narrower definition of a group 'organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized' " (Pet. App. 11a, quoting *United States* v. *Sutton*, 605 F. 2d 260, 264 (6th Cir. 1979), overruled on rehearing, 642 F. 2d 1001 (6th Cir. 1980) (en banc), petitions for cert. pending, Nos. 80-6058, 80-6137, 80-6141, 80-6147, 80-6253, 80-6254, 80-6272). And, following the grant of certiorari in *Turkette*, this Court denied the petitions filed by petitioners' co-defendants in *Carbone* v. *United States, supra*, and *Caliguri* v. *United States*, No. 80-6047 (Mar. 9, 1981). Accordingly, it is unnecessary to defer consideration of the instant petitions pending disposition of *Turkette*.

2. Petitioner Janovich contends (Pet. 4-7) that tape recordings of conversations he and petitioner Williams had

with a federal undercover agent should have been excluded from evidence. He invokes Wash. Rev. Code § 9.73.030 (1979), which prohibits the recording of oral communications absent the consent of all parties or a court order. However, the court of appeals correctly held (Pet. App. 6a-7a n.4) that the admissibility of evidence in federal courts is determined by federal rather than state law. See, *e.g.*, *United States* v. *Nelligan*, 573 F. 2d 251, 253-254 (5th Cir. 1978); *United States* v. *Testa*, 548 F. 2d 847, 855-856 (9th Cir. 1977).[3] As Janovich acknowledges (Pet. 4), federal law expressly permits "a person acting under color of law," such as the undercover agent here, to intercept communications to which he is a party. 18 U.S.C. 2511(2)(c).

Petitioner's claim (Pet. 5) that the state statute should apply because the RICO conspiracy count was predicated in part on the violation of state gambling laws is insubstantial. RICO does not punish violations of state law as such, but instead defines a new federal offense premised on a legitimate federal interest in eradicating racketeering and organized crime. See, *e.g.*, *United States* v. *Forsythe*, 560 F. 2d 1127, 1135 (3d Cir. 1977); *United States* v. *Bianchi*, 542 F. 2d 98, 101 (1st Cir. 1976). Although various state law violations are enumerated as "racketeering activity" in 18 U.S.C. 1961(1), their inclusion "is solely for definitional purposes" with respect to one element of a RICO offense and does not serve to equate the distinct federal and state crimes. *United States* v. *Malatesta*, 583 F. 2d 748, 757 (5th Cir. 1978), modified on other grounds, 590 F. 2d 1379 (en banc), cert. denied, 444 U.S. 846 (1979).

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[3] *State* v. *Williams*, 94 Wash. 2d 531, 617 P.2d 1012 (1980), upon which Janovich relies (Pet. 7), explicitly recognizes that "federal authorities can * * * use * * * evidence in federal court as Congress intended" irrespective of "state statutory criteria * * * appli[cable] to determine the admissibility of federal agents' evidence in state court" (617 P.2d at 1017).

3. Petitioner Janovich also argues (Pet. 9-11) that the district court erred in admitting into evidence the out-of-court statements of Undersheriff Carl Skagg and Inspector David Larson as statements of co-conspirators under Fed. R. Evid. 801(d)(2)(E). Specifically, he challenges this evidence on the grounds that the indictment did not name Skagg and Larson as unindicted conspirators and that he was not informed that they were co-conspirators until the day before their statements were admitted.

The failure to name Skagg and Larson in the indictment did not bar the admission of their statements. It is well settled that the admissibility of an out-of-court declaration by a co-conspirator does not depend on the existence of a conspiracy count in the indictment, let alone on the inclusion of the declarant as a co-conspirator. See, *e.g.*, *United States* v. *Smith*, 596 F. 2d 319 (8th Cir. 1979); *United States* v. *Durland*, 575 F. 2d 1306 (10th Cir. 1978); *United States* v. *Doulin*, 538 F. 2d 466 (2d Cir.), cert. denied, 429 U.S. 895 (1976).[4]

Janovich has also failed to demonstrate that any prejudice resulted from the delay in identifying Skagg and Larson as co-conspirators. Indeed, he was notified of their status only 10 days after the start of a three-month trial and a full two months before he began presenting evidence; yet at no time did he attempt to contest the admissibility of their statements.

Furthermore, the government had substantial justification for withholding the information until that time. The primary sources of the information concerning Skagg and Larson were attorney Sam Allotta and his secretary, Linda

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[4]Indeed, some courts have expressly condemned the practice of naming co-conspirators in an indictment without charging them. See *United States* v. *Chadwick*, 556 F. 2d 450 (9th Cir. 1977); *United States* v. *Briggs*, 514 F. 2d 794, 804-805 (5th Cir. 1975).

Nacewicz. Both witnesses had expressed their fears to the prosecutor that they would be murdered before they could testify; indeed, Nacewicz had received a warning from Joseph Carbone that she should not cooperate with the prosecutor "or else" (Tr. 1225). In view of these concerns and the nature of the violent crimes charged against the defendants (including threats of murder and the near-fatal assault on suspected informant Jerome Weinstein (Pet. App. 5a, 13a-15a, 30a-33a)), the prosecution chose not to make a more complete disclosure until the safety of Allotta and Nacewicz had been ensured (Tr. 1225). In these circumstances, the out-of-court statements were not rendered inadmissible simply because such disclosure was not made at some earlier point.

4. Petitioner Janovich lastly asserts (Pet. 11-12) that the district court erred in failing to give a multiple-conspiracy instruction because the "protection" arrangement with the undercover agent who posed as a potential buyer of the tavern owned by Williams and Mazzuca was unrelated to the RICO conspiracy. However, the evidence showed an extensive relationship between Janovich and the Carbone organization wholly apart from this incident (see page 4, *supra*) and was sufficient to prove the existence of a single conspiracy. Moreover, the evidence established that this "protection" arrangement was closely connected to the other affairs of the enterprise: the arrangement was negotiated through petitioners Williams and Mazzuca and was included by them in the sale price of the tavern to the undercover agent (Pet. App. 4a-5a); Williams was promised "a piece of the action" in return for the sale of "protection" and was to oversee the operation of the tavern (Ct. Exh. 64 at 19-20; Ct. Exh. 65 at 82); and Mazzuca and other members of the organization were to work for the agent (Ct. Exh. 65 at 138-139). This evidence adequately demonstrated that there was a single conspiracy "to operate and

control enterprise taverns and related activities with minimal interference from law enforcement agencies" (Pet. App. 13a) and that Janovich's "dealings with the agent did not form a separate conspiracy, but were acts in furtherance of a continuing conspiracy by inducing the 'buyer' to become a new participant" (*id.* at 40a). Accordingly, the district court properly concluded that a multiple-conspiracy instruction was not required. See, *e.g.*, *United States* v. *Moten*, 564 F. 2d 620, 625 (2d Cir.), cert. denied, 434 U.S. 959 (1977); *United States* v. *Kearney*, 560 F. 2d 1358, 1363 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Perry*, 550 F. 2d 524, 531 (9th Cir.), cert. denied, 434 U.S. 827 (1977); *United States* v. *Ricco*, 549 F. 2d 264, 267-268 (2d Cir.), cert. denied, 431 U.S. 905 (1977).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]At all events, the court's charge stated that a conspiracy involved "a mutual understanding to try to accomplish a common and unlawful plan," that a co-conspirator was one who participated in the conspiracy "with knowledge of the essential nature of the unlawful plan," and that, in order to convict, the jury had to find that "the conspiracy alleged in the Indictment" was proven beyond a reasonable doubt (Instruction No. 25). These instructions were adequate to apprise the jury of the government's obligation to establish a single conspiracy consisting of a common plan or agreement.

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see 80

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